

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

RECEIVED

2007 DEC 27 PM 1:29

IN THE MATTER OF:

**DIVISION OF WATER
POLLUTION CONTROL**

JIMMY TOSH d/b/a TOSH FARMS

Docket No. 04.30-097473A

RESPONDENT

CASE NO. 07-0281

AGREED ORDER

This matter came to be heard before the Tennessee Water Quality Control Board upon the Commissioner's Order and Assessment and the Respondent's Petition to Appeal. The Board, a quorum present, hereby adopts the following Findings of Fact and Conclusions of Law and Order and Assessments to which the parties have agreed, as evidenced by the signatures of counsel below.

FINDINGS OF FACT

I.

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "Department").

II.

Jimmy Tosh (hereinafter the "Respondent") is doing business as Tosh Farms and is the owner and operator of multiple Class I Concentrated Animal Feeding Operations (CAFOs) throughout West Tennessee and Southwest Kentucky. In particular, the Respondent owns and operates an active operation in Henry County located at 1586

Atlantic Avenue, P.O. Box 214, Henry, Tennessee 38321 (hereinafter the "site"). The site is also the location for the Tosh Farms headquarters office. The site consists of a granary for mixing animal feed, an active hog barn with primary and secondary lagoons, a truck wash area with a lagoon for cleaning and sanitizing truck trailers, an anhydrous ammonia area, and two hog barns currently under construction. Service of process may be made on the Respondent at 1586 Atlantic Avenue, P.O. Box 308, Henry, Tennessee 38231.

III.

Whenever the Commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the Water Quality Control Act, (hereinafter the "Act") has occurred, or is about to occur, the Commissioner may issue a complaint to the violator and may order corrective action be taken pursuant to T.C.A. §69-3-109(a) of the Act. Further, the Commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. §69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter the "Rule").

IV.

The Respondent is a "person" as defined at T.C.A. §69-3-103(20), and as hereinafter stated, has violated the Act.

V.

T.C.A. §69-3-108 requires a person to obtain coverage under a permit prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Rule 1200-4-5-.08 states in part that a set of effluent limitations will be required in each permit that will indicate adequate operation or performance of treatment units used and that appropriately limit those harmful parameters present in the wastewater. Furthermore, it is unlawful for any person to increase the volume or strength of any wastes in excess of the permissive discharges specified under any existing permit. Additionally, the state requires a National Pollutant Discharge Elimination System (NPDES) permit for the operation of a CAFO. Further, Rule 1200-4-5-.14(16)(a), states, large CAFOs with liquid manure management systems are required to develop, submit for state approval, implement and keep onsite a comprehensive nutrient management plan (CNMP) that meets National Resources Conservation Service (NRCS) standards as found in the NRCS Field Office Conservation Practice Standards and/or the NRCS Animal Waste Handbook.

VI.

T.C.A. §69-3-108 requires a person to obtain coverage under a permit prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substances will move into waters of the state. Coverage under the Tennessee Construction General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the "TNCGP") may be obtained by submittal of a Notice of Intent (NOI).

VII.

Neil Ditch, referred to herein, is "waters of the state" as defined by T.C.A. §69-3-103(33). Pursuant to T.C.A. §69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, "Use Classifications for Surface Waters, et al," is contained in the *Official Compilation of Rules and Regulations for the State of Tennessee*. Accordingly, Neil Ditch has been classified for the following uses: fish and aquatic life, livestock watering and wildlife, recreation, and irrigation.

VIII.

On March 12, 2007, personnel with the Division of Water Pollution Control (hereinafter the "division") received a complaint of black water flowing in Neil Ditch at Pig Lane, approximately 500 yards downstream of the site.

IX.

On March 13, 2007, the division notified the Tennessee Department of Agriculture (TDA) of the March 12, 2007, complaint regarding the site.

X.

On March 14, 2007, the division conducted a complaint investigation and observed hog waste in Neil Ditch at Pig Lane, approximately 500 yards downstream of the site, and at Atlantic Avenue, which is approximately 200 yards downstream from the site. The division continued to the site and observed a near empty waste lagoon, a pump, and a reel and gun left locked in position. The spray gun was not operating, but was

locked in position and was pointed towards a breached cattle-watering pond, which leads to Neil Ditch at Atlantic Avenue. While on site, division personnel observed a truck wash operation with a lagoon, one active hog barn with two lagoons, a granary operation, an additional active pit barn, and an additional hog barn under construction. Division personnel observed no erosion prevention and sediment control (EPSC) measures installed, and upon further investigation, determined that authorization under the TNCGP had not been granted. Further, coverage under a CAFO permit had not been obtained for the active hog barns.

Bacteriological samples were taken in Neil Ditch downstream of the site, at Atlantic Avenue and Pig Lane. The results are included in the following table:

Bacteriological analysis conducted	Results from samples taken in Neil Ditch, downstream of site at Pig Lane (approximately 500 yards downstream of site)	Results from samples taken in Neil Ditch, downstream of site at Atlantic Avenue (approximately 200 yards downstream of site)
E. Coli (CFU/100ml)	>24,000	>2,400
Fecal Coliform (CFU/100ml)	Estimate of 460,000	Estimate of 110,000

XI.

On March 20, 2007, the division issued a Notice of Violation (NOV) to the Respondent detailing the violations observed during the March 14, 2007, site investigation. The NOV requested the Respondent to submit the following information to the division:

- A complete inventory of the facilities located in Tennessee operated by the Respondent by April 6, 2007.
- An inventory and Material Safety Data Sheets (MSDS) of materials/chemicals stored in the aboveground storage tanks at the site by April 6, 2007.
- A summary of the disposal methods, locations, and testing results from the three animal waste/chemical waste lagoons located on site.
- Sampling results from the sludge material remaining in the emptied lagoon by April 30, 2007.
- A complete NOI and SWPPP to obtain coverage under the TNCGP, and to install effective EPSC measures immediately.
- Confirm that the current CAFO application and CNMP includes all activities occurring at the site by April 6, 2007.
- An NPDES permit application for the truck wash operation occurring at the site by April 30, 2007.

XII.

On March 22, 2007, the division conducted a follow-up inspection at the site and observed the Respondent operating the two existing hog barns at the site without permit

coverage. Additionally, the pit barn under construction had no EPSC measures installed and no NOI or SWPPP had been submitted for coverage under the TNCGP.

XIII.

On April 4, 2007, the Respondent provided a portion of the information requested in the March 20, 2007, NOV. No sample results were submitted for the animal waste/chemical waste lagoons, no NOI or SWPPP was submitted for coverage under the TNCGP for any construction activities occurring at the site, and no NPDES permit obtained for the truck wash area.

XIV.

On April 10, 2007, the division received a NOI and SWPPP for construction activities associated with the granary. However, the SWPPP was determined to be insufficient and additional information was needed before coverage under the TNCGP could be granted.

XV.

On April 18, 2007, the division conducted another complaint investigation at the site and observed that construction activities associated with the pit barns had expanded. Still no NOI or SWPPP had been submitted seeking coverage under the TNCGP for the activities.

XVI.

On April 19, 2007, the division issued a NOV to the Respondent detailing the violations observed during the April 18, 2007, site investigation. The NOV again notified the Respondent that coverage under the TNCGP must be obtained for construction activities that are over one acre, or under one acre, but part of a larger development. Further, the NOV requested the following information be submitted to the division by May 4, 2007:

- Submit a NOI, site-specific SWPPP, and associated fees for the construction activities occurring at the site associated with the pit barn, the granary expansion area, and the closure of the existing truck wash lagoon and construction of the new lagoon.
- Submit a map illustrating locations of fields used for waste disposal from the Tosh-Bavard and Tosh House Pit Barns, and the truck wash lagoon.

XVII.

On April 23, 2007, the division issued a Notice of Deficiency (NOD) to the Respondent regarding the April 10, 2007, NOI and SWPPP. The NOD detailed the additional information needed to obtain coverage under the TNCGP.

XVIII.

On May 3, 2007 the division received an NOI and SWPPP for construction activities associated with the pit barns. Additionally, the division has determined that an individual NPDES permit application is not required for the truck wash operation.

XIX.

During the course of investigating this matter, the Department incurred damages in the amount of ONE THOUSAND THREE HUNDRED FIFTY-EIGHT DOLLARS AND FORTY-TWO CENTS (\$1,358.42).

CONCLUSIONS OF LAW

XX.

By conducting construction activities without authorization under the TNCGP, and by conducting operations without authorization under an individual NPDES, and by failing to furnish information, the Respondent has violated T.C.A. §§69-3-108(a) and (b) and 69-3-114(b), which state:

T.C.A. §§69-3-108(a) and (b):

- (a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.
- (b) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:
 - (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
 - (2) The construction, installation, modification, or operation of any treatment works, or part thereof, or any extension or addition thereto;
 - (3) The increase in volume or strength of any wastes in excess of the permissive discharges specified under any existing permit;
 - (4) The development of a natural resource or the construction, installation, or operation of any establishment or any

extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;

- (5) The construction or use of any new outlet for the discharge of any wastes into the waters of the state;
- (6) The discharge of sewage, industrial wastes, or other wastes into water, or a location from which it is likely that the discharged substances will move into waters;

T.C.A. §69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in §69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the commissioner under this part.

XXI.

By discharging wastewater into waters of the state that resulted in a condition of pollution, the Respondent has violated T.C.A. §69-3-114(a), as referenced below, and §69-3-114(b), as referenced above.

T.C.A. §69-3-114(a):

It shall be unlawful for any person to discharge any substance into waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER

XXII.

WHEREFORE, PREMISES CONSIDERED, it is hereby **ORDERED** by the Water Quality Control Board as follows:

- 1) The Respondent is hereby assessed a CIVIL PENALTY in the amount of FOURTEEN THOUSAND THOUSAND DOLLARS (\$14,000.00), payable to the division within THIRTY (30) DAYS of receipt of this Order.
- 2) The Respondent is hereby assessed DAMAGES in the amount of ONE THOUSAND THREE HUNDRED FIFTY-EIGHT DOLLARS AND FORTY-TWO CENTS (\$1,358.42) to be paid to the division within THIRTY (30) DAYS of receipt of this Order and Assessment.
- 3) The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

THIS AGREED ORDER SHALL BECOME EFFECTIVE UPON ENTRY.

APPROVED FOR ENTRY:

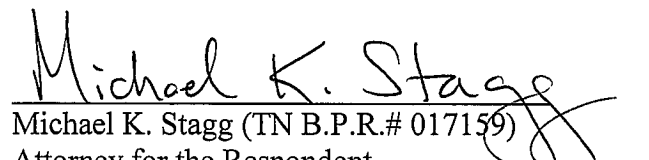
FOR THE TENNESSEE WATER QUALITY CONTROL BOARD:


Chairperson

Adopted and approved by a majority of the Board, quorum being present this
18th day of December, 2007.

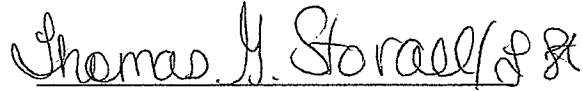


Patrick N. Parker (TN B.P.R. #14981)
Tennessee Department of Environment and Conservation
20th Floor L&C Tower
401 Church Street
Nashville, TN 37243-1548
(615) 532-0131


Michael K. Stagg (TN B.P.R.# 017159)
Attorney for the Respondent
WALLER LANSDEN DORTCH & DAVIS, LLP
511 Union Street, Suite 2700
Nashville, Tennessee 37219
Telephone: (615) 244-6380

Entered in the Office of the Secretary of State, Administrative Procedures

Division, this 27th day of December, 2007.



Thomas G. Stovall, Director
Administrative Procedures Division

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document has been served upon all interested parties by delivering same to their offices or by placing a true and correct copy of same in the United States mail, postage prepaid.

This 27th day of December, 2007.



Assistant General Counsel